

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
GCI Communication Corp.)	
)	
Request for Review of Decision)	WC Docket No. 02-60
of the Universal Service Administrator)	

**REQUEST FOR REVIEW OF DECISION OF
THE UNIVERSAL SERVICE ADMINISTRATOR
AND PETITION FOR WAIVER**

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SUMMARY

GCI Communication Corp. (“GCI”) seeks review of eight related decisions of the Universal Service Administrator (“USAC”) denying funding appeals in connection with eight funding request numbers (“FRNs”) for Funding Year (“FY”) 2016.¹ All of the appeals arose due to service upgrades that occurred during the funding year. In each case, the USAC Rural Health Care Division (“RHCD”) issued *two* Funding Commitment Letters (“FCLs”) covering GCI’s services to the Healthcare Provider (“HCP”) for the funding year—(1) the first for the service in place at the beginning of FY2016 covering service from July 1, 2016 to the anticipated mid-year FY2016 upgrade date and, (2) the second for the planned upgraded service in FY2016 covering service from the mid-year upgrade date to the end of FY2016 (June 30, 2017). But because of unforeseen delays in the installation of the upgraded services, the dates specified on the Form 466 Funding Requests and FCLs did not match the actual service dates. In each case, the service upgrade occurred after the anticipated planned service upgrade date listed in the second set of FCLs.

Nevertheless, in each case, the two original FCLs together committed far *more* funding for the funding year than the HCP ultimately sought in its Form 467 Connection Certifications. In each case, because the time period for the first service was longer in the Form 467 than it was in the FCL, the HCP received more funding under the first FRN than the first FCL had authorized based on anticipated, but ultimately inaccurate, service end and start dates. For each

¹ See 47 C.F.R. §§ 54.719, 54.722. As described in additional detail below, these FRNs are: Atka – Aleutian Pribilof Islands Association, Inc (“APIA”) (FRN 1694664), Elim – Norton Sound Health Corporation (“NSHC”) (FRN 1689637), Golovin – NSHC (FRN 1689643), Koyuk – NSHC (FRN 1690144), Nikolski – APIA (FRN 1694663), Oonalaska – APIA (FRN 1694657), White Mountain – NSHC (FRN 1690091), (September 30, 2019 USAC decisions) and St. George - APIA (FRN 1694661) (September 16, 2019 USAC decision).

FRN, USAC issued a Notification of Funding Commitment Adjustment (“COMAD”) letter seeking repayment of what it determined was “unauthorized” funding provided under the first FRN for any funding beyond the amount that was authorized in the FCL. GCI repaid this amount for each FRN, but also appealed to USAC, contending that the funding was not “unauthorized” and that the delay in service upgrades resulted in the disbursement of less funding than the two FCLs for FY2016 had authorized together. USAC denied all eight appeals, reasoning that support is absolutely capped at the amount provided in the FCL, regardless of post-commitment service changes or delays.

USAC’s decisions (the “USAC denials”) incorrectly conclude that the Commission’s rules forbid it from rectifying an unplanned service delay, even where the delay results in *less* funding than committed in the original FCLs. Specifically, USAC maintains that it is forbidden from considering a pair of FCLs for the same HCP *together*, even though one succeeds the other. According to USAC, even when two FCLs together commit far *more* funding than sought by the HCP, USAC is still obliged to deny funding for the less expensive, pre-upgrade service for the entire period between the anticipated and actual service upgrade dates, rather than to either (1) extend the service dates for the first FCL while truncating the second, or (2) permit the second FCL to be modified to reflect to the less expensive pre-upgrade service for the portion of that period before the upgrade occurred. The end result of USAC’s administrative approach is a complete lack of funding for the time period between the anticipated and actual service upgrade dates, even though services eligible for support were provided to the HCPs during that period.

That decision has no basis in law or policy. The Commission’s rules do not state that support for services being upgraded cannot be conformed to the actual service dates for each service across the two funding requests. Indeed, nothing in the rules dictates that a circuit

upgrade must be divided into two funding requests. There is no issue of exceeding the FY2016 budget cap because the cap was based on the amounts committed in the FCLs—and the amount at issue in each situation here is *less* than the committed amount. Further, there is no issue of claiming support for services not rendered, because GCI provided services to each of the HCPs throughout the entire funding year. Installation dates are difficult to predict in advance, and it is wholly unrealistic, unworkable, and arbitrary to construct a processing system that precludes any change to the upgrade installation date without resulting in a loss of support for the actual service rendered, even when the total support payment for a funding year decreases.

Unfortunately, this is not the first experience GCI has had with USAC erecting purely administrative roadblocks to support for upgraded circuits. For FY2013, USAC prevented HCPs from obtaining bandwidth upgrades under evergreen contracts because USAC erroneously concluded that such upgrades violated competitive bidding rules. The Commission reversed USAC’s decisions, allowing service upgrades that did not represent cardinal changes. Here, USAC has again adopted unnecessary administrative impediments to support for services being upgraded—but this time in direct contravention of its own guidance that “the dates for both FCLs could be adjusted to match the dates of the service change (in most cases).”²

USAC’s approach unnecessarily transforms an administrative problem into real-world financial hardship, denying funding for critical services necessary to provide telehealth services. Accordingly, GCI asks the Commission to direct USAC to increase the service dates under the first FCL for the pre-upgrade service and reduce the service dates under the second FCL for the

² See Attachment J, GCI July 2019 Request for Review, at Exhibit 3, Attachment 3, Email from Carolyn McCornac, RHCD, to Jeffrey Mitchell, Counsel for GCI (Nov. 4, 2016); *see also infra* at 8, n.17. GCI has removed personally identifying information from Attachment J for public filing on ECFS.

post-upgrade service, where the total support sought in the two FCLs, as modified, is less than under the original FCLs. This would result in an application of the Commission's rules to prevent sacrificing the substantive goals of the Rural Healthcare ("RHC") Program due to administrative hurdles.

In the alternative, GCI seeks a waiver of the rules applicable in FY2016 to allow the application of the service substitution rule from the Healthcare Connect Fund ("HCF") program contained in 47 C.F.R. § 54.646, and subsequently expressly adopted for the Telecommunications Program ("Telecom Program"), to the FY2016 FRNs at issue here. If the service substitution rules had been applicable to the Telecom Program during FY2016, they would have provided a solution to this issue by allowing the HCPs to substitute the pre-upgrade service for part of the period under the second FRN, without changing the dates or increasing the amount of funding provided under either FCL. Now that the Commission has recently concluded that the service substitution rules *do* apply to the Telecom Program going forward, applying them here as well would provide a straightforward solution to this dispute. "[G]ood cause" exists to grant this waiver because, if the Commission agrees with USAC's construction of the then-existing rules, the underlying purpose of the RHC rules would be frustrated by application to the instant case.³

³ 47 C.F.R. § 1.3; *see Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (explaining that "[t]he FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest"). A similar waiver rule states that the Commission may grant a waiver if "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest." 47 C.F.R. § 1.925(b)(3)(i).

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**REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE
ADMINISTRATOR AND PETITION FOR WAIVER**

GCI Communication Corp. seeks review—pursuant to 47 C.F.R. Sections 54.719(b) and (c)—of eight related USAC decisions (the “USAC denials”) denying funding appeals in connection with eight FRNs for FY2016.¹ Pursuant to Section 54.723 of the Commission’s rules, the Commission reviews decisions issued by USAC *de novo*.² In the alternative, GCI seeks a waiver pursuant to Section 1.3 of the Commission’s rules to permit support of these eligible services for the full period they were provided, utilizing the service substitution approach

¹ See 47 C.F.R. §§ 54.719, 54.722. As described in additional detail below, these FRNs are: Atka – APIA (FRN 1694664), Elim – NSHC (FRN 1689637), Golovin – NSHC (FRN 1689643), Koyuk – NSHC (FRN 1690144), Nikolski – APIA (FRN 1694663), Oonalaska – APIA (FRN 1694657), White Mountain – NSHC (FRN 1690091), (September 30, 2019 USAC decisions) and St. George - APIA (FRN 1694661) (September 16, 2019 USAC decision).

GCI submits one request for review that consolidates the eight USAC denials because they involve the same underlying issue. The Commission has considered such consolidated requests for multiple USAC decisions in similar circumstances. See, e.g., *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, Public Notice, DA No. 19-1120, CC Docket No. 02-6, WC Docket No. 02-60, at 5 (rel. Oct. 31, 2019) (granting the request for waiver of Yeshiva Rabbi Samson Raphael Hirsch, NY, Application Nos. 181016867, 181038071, Request for Waiver, CC Docket No. 02-6 (filed Aug. 15, 2019)).

² See 47 C.F.R. § 54.723.

recently adopted for the Telecom Program going forward.³ Both avenues support the statutory objectives of Section 254(h)(1)(A), and both result in disbursing *less* support than was initially committed when upgrades were projected to occur earlier than they actually happened.

USAC's decisions lack any basis in the text of the Commission's rules, undermine the basic purposes of the RHC Program, and unnecessarily transform an administrative problem into real-world financial hardship. GCI asks the Commission to direct USAC to reverse its wooden application of requirements it created for its own processing convenience, and instead fund circuit upgrades that encounter delayed installations in a commonsense manner. Specifically, USAC should fund the service at the level of the pre-upgrade circuit for as long as that circuit was in service, and then at the level of the upgraded circuit for as long as that circuit was in service, as long as the change does not increase the total support to be received for both above the originally requested support provided in both FCLs for a given funding year.

In the alternative, if the Commission agrees with USAC that the rules as written disallow this solution, GCI seeks a waiver of the FY2016 rules to allow the application of the service substitution rules from the HCF Program, contained in 47 C.F.R. § 54.646, to the FRNs at issue here. “[G]ood cause” exists to grant this waiver because the underlying purpose of the rules—to facilitate the affordable, reliable, and sustainable provision of health care in our nation’s rural areas—would be frustrated by strict compliance in this case.⁴

³ 47 C.F.R. § 1.3.

⁴ 47 C.F.R. § 1.3; *see Northeast Cellular*, 897 F.2d at 1166 (“The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”). *See also* 47 C.F.R. § 1.925(b)(3)(i).

STATEMENT OF INTEREST

The RHC Telecom Program supports the provision of critically important telehealth services in rural and underserved communities across our nation.⁵ GCI is an eligible service provider participating in the RHC Telecom Program and provides telecommunications services to remote HCPs across Alaska. Many of these communities are inaccessible by road and depend on telecommunications links to Anchorage for the provision of life-saving healthcare. HCPs in remote Alaska rely on federal funding to support the provision of even basic healthcare, and as the Commission has recognized, the RHC Telecom Program fills a critical need in Alaska, given the unique challenges HCPs face in obtaining medical services.

STATEMENT OF FACTS

All of the USAC denials at issue here involve service upgrades that GCI provided during FY2016. Due to the practical realities of climate, weather, and topographic and geographic challenges unique to Alaska, these service upgrades did not occur as scheduled and on the dates indicated on the Form 466 Funding Request Forms and FCLs for each FRN.

In each case, RHCD issued *two* FCLs covering GCI's services to the HCP for the funding year—(1) the first for the service in place at the beginning of FY2016 covering service from July 1, 2016 to the anticipated mid-year FY2016 upgrade date and, (2) the second for the planned upgraded service in FY2016 covering service from the mid-year upgrade date to the end of FY2016 (June 30, 2017). But because of unforeseen delays in the installation of the upgraded services, the dates specified on the Form 466 Funding Requests and FCLs did not match the

⁵ See *Promoting Telehealth in Rural America*, Report & Order, 34 FCC Rcd. 7335, ¶¶ 1-4 (2019) ("Promoting Telehealth Order").

actual service dates. In each case, the service upgrade occurred after the anticipated planned service upgrade date listed in the second set of FCLs.

But, in each case, the two original FCLs together committed far *more* support for the funding year than the HCP ultimately sought in its Form 467 Connection Certifications. In each case, because the time period for the first service was longer in the Form 467 than it was in the FCL, the HCP received more funding under the first FRN than the first FCL had authorized based on an anticipated, but ultimately inaccurate, service upgrade date. However, that additional support was more than offset by a reduction in the support actually provided under the second FRN for the more expensive, upgraded service. As a result, the total amount of funding that the HCP actually received for FY2016 was—in every case—substantially *less* than the total amount approved under each *pair* of FCLs for that HCP in FY2016. The following table and the more detailed spreadsheet attached as Attachment A show—for all eight appeals at issue here—both the total *approved* funding for FY2016 based on the anticipated service dates provided, and the *actual* amount of disbursed funding based on the actual service dates.

HCP Name	First FRN	Second FRN	Total FY2016 Committed Funding (both FCLs)	Total FY2016 Disbursed Funding (both FRNs)	Funding Originally Disbursed (first FRN)	Funding Returned to USAC per COMAD (first FRN)
Atka APIA	16946641	16946651	\$305,639.81	\$181,570.47	\$95,806.23	\$51,188.02
Elim NSHC	16896371	16905431	\$798,665.03	\$750,290.18	\$467,241.19	\$130,392.86
Golovin NSHC	16896431	16905441	\$798,665.03	\$750,290.18	\$467,241.19	\$130,392.86
Koyuk NSHC	16901441	16905451	\$798,665.03	\$673,696.66	\$673,696.66	\$336,848.33
Nikolski APIA	16946631	16946631	\$305,639.21	\$186,850.01	\$93,628.01	\$49,009.80
Oonalaska APIA	16946571	16946701	\$326,865.70	\$132,354.75	\$123,005.61	\$76,618.31
St. George APIA	16946611	16946731	\$307,680.05	\$176,013.44	\$98,347.44	\$53,729.23
White Mountain NSHC	16900911	16905481	\$798,665.03	\$750,290.18	\$467,241.19	\$130,392.86

For each FRN, USAC issued a COMAD letter seeking repayment of what it determined was “unauthorized” funding provided under the first FRN for any funding beyond the amount that was authorized in the FCL. GCI repaid all of these funds, totaling \$958,572.27 for the eight FRNs, but also appealed to USAC, contending that the funding was not “unauthorized” and that the delay in service upgrades resulted in the disbursement of less funding than the two FCLs for FY2016 had authorized together. GCI requested that USAC (1) adjust the service dates of each pair of FCLs (for the original and upgraded services) to reflect the services actually provided during the time period covered by the two FCLs together; or (2) grant a waiver of the Form 467

instructions to permit a Date of Disconnection later than the Funding End Date for each of the pre-upgrade FCLs.⁶

USAC denied all of the appeals in nearly identical decisions. Each rejected what USAC construed as four separate GCI arguments. First, USAC rejected GCI's claim that the support was not "unapproved" when the two FCLs are taken together, reasoning that the second "funding request was not for the same service[]." ⁷ Approval of funding for the upgraded service, USAC opined, "did not constitute approval of additional funding" for the initial service. This aspect of USAC's decision contains no legal reasoning or reference to FCC rules, but merely notes that the services were different. For the Atka clinic, for example, USAC noted that the FCL for the first FRN approved support for a 3-Mbps Satellite Service and the FCL for the second FRN approved support for a 10-Mbps Satellite Service.⁸

Second, USAC rejected GCI's explanation that the total amount disbursed was less than the total amount committed under the two FCLs taken together. It stated that "if USAC issues an FCL approving an HCP's funding request, support for the requested services is capped at the amount specified in the letter," and "[t]he fact [that] additional support amounts may be offset by a reduction in the amount of funding disbursed for a separate commitment is immaterial, as USAC is not authorized to waive FCC rules."⁹ For the proposition that support is capped at the amount specified in the FCL, USAC cited to the Commission's 2012 decision adopting rules for

⁶ See Attachments B - I (containing the appeal letters from GCI to the USAC Rural Healthcare Division for the eight HCPs at issue). GCI has removed personally identifying information from Attachments B - I for public filing on ECFS.

⁷ See, e.g., Attachment B, Letter from the Universal Service Administrative Company to Timothy Simeone, at 3-4 (Sept. 30, 2019) ("Atka USAC Denial Letter").

⁸ *Id.* at 4, n.23.

⁹ *Id.* at 4.

the HCF Program.¹⁰ As discussed below, however, that Order adopted the service substitution rule for the HCF Program that *allows* support for service substitutions under certain conditions “if the substitution will not cause the total amount of support under the funding commitment letter to increase.”¹¹ USAC did not apply any similar safety-valve here.

Third, USAC rejected GCI’s argument that USAC’s failure to permit HCPs to extend the funding period for individual commitments undermines the substantive, statutory goals of the Telecom Program because it is not always possible to estimate the installation dates for new services. USAC maintained that this argument involves matters of “policy”—and because USAC is not authorized to make policy, it would not address this claim at all.¹²

Finally, USAC rejected GCI’s request for USAC to amend the FCL at issue and adjust the underlying funding commitment, or to permit the HCP to enter a Date of Disconnection on its FCC Form 467 that is later than the Funding End Date. USAC repeated that once it approves a funding request, support is capped at the amount provided in the FCL for that commitment, and that USAC is not authorized to waive that “requirement.”¹³ USAC did not cite any new authority for this conclusion, but simply referred back to its earlier citations to the 2012 FCC decision and provisions of the Commission’s rules preventing USAC from making policy.

¹⁰ See *id.* (citing *Rural Health Care Support Mechanism*, Report & Order, 27 FCC Rcd. 16678, ¶¶ 302, 315 (2012) (“Healthcare Connect Fund Order”)).

¹¹ See Healthcare Connect Fund Order ¶ 315.

¹² See Atka USAC Denial Letter at 4 (citing 47 C.F.R. § 54.702(c)) (“[USAC] may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.”); see also 47 C.F.R. § 54.719(c) (“Parties seeking waivers of the Commission’s rules shall seek relief directly from the Commission.”).

¹³ *Id.* at 5.

GCI has filed a separate Petition for Review and Request for Waiver with the Commission involving a similar issue for a number of other USAC decisions regarding FY2016 FRNs.¹⁴ That Petition notes, as further set forth below, that the Commission previously corrected USAC’s refusal to accommodate service upgrades under existing evergreen contracts, and explains that USAC’s current policy regarding service upgrade delays similarly frustrates critical bandwidth upgrades for remote Alaskan HCPs.¹⁵ GCI’s earlier Petition also explains that, prior to 2016, USAC addressed mid-year service upgrades by allowing HCPs to submit two FRNs with overlapping start and end dates for the upgraded services, but that in FY2016 USAC began to prohibit overlapping start and end dates for service upgrades.¹⁶ At that same time, however, USAC repeatedly provided guidance to GCI and its customers that “gaps in funding caused by its new policy” could “be addressed through revision of the service dates through the Form 467[s].”¹⁷

¹⁴ See Attachment J, *GCI Communication Corp. Request for Review of Decision of the Universal Service Administrator and Petition for Waiver*, WC Docket No. 02-60 (filed July 12, 2019) (“GCI July 2019 Request for Review”). The FRNs in that request involve the same service upgrade delay problem, but also present an additional issue—not implicated here—regarding notice and appealability of USAC’s “action” and time limits for appeal.

¹⁵ See *id.* at 3.

¹⁶ See *id.* at 3-4. See also Attachment K, Example of FY2015 Mid-Year Service Upgrade (FCLs authorizing overlapping FCLs for the existing and upgraded service). GCI has removed personally identifying information from Attachment K for public filing on ECFS.

¹⁷ GCI July 2019 Request for Review at 5. USAC provided the same guidance to other carriers as well. See, e.g., *Request for Review by Alaska Communications of Decision of Universal Service Administrator and Provisional Petition for Waiver of Section 54.720(a) of the Commission’s Rules*, WC Docket No. 02-60, at 4 (filed Oct. 21, 2019) (“A representative of the USAC Rural Health Care Division (‘RHCD’) confirmed as correct that, ‘[o]nce a Start Date has been entered for the post-upgrade 466[,] the stop date on the pre-upgrade will be updated to match.’”) (alterations in original) (quoting email correspondence from Matthew Squire, USAC, to Abigail Hanley, Alaska Communications (July 19, 2017)).

GCI accordingly requests that the Commission either (1) direct USAC to allow adjustment of the dates on the FCLs to reflect actual service dates or (2) waive the FY2016 rules and reflect the delayed upgrade installation under a service substitution approach.

ARGUMENT

I. NOTHING IN THE COMMISSION’S RULES OR PRECEDENTS BARS THE RELIEF THAT GCI SEEKS.

All service upgrades, whether for the RHC Telecom Program, or in the commercial market, can be subject to delays in installing and turning up service. That is especially true in Alaska, which has an extremely challenging climate and geography.¹⁸ As a result, it is not possible to determine in advance precisely when new services will be installed—service providers and HCPs must accordingly estimate the upgrade date, and such estimates may prove incorrect. When an upgrade is delayed, GCI cannot—and should not—simply cease providing the pre-upgrade service until the upgrade is installed: it must continue to provide the pre-upgrade service so that the clinic can continue to operate. But once the FCLs have been issued, the Commission’s rules do not contemplate a specific method for revising the service dates to accurately reflect when the service upgrade actually occurred.

Of course, USAC has long been aware of this problem. Again, during FY2016, it specifically advised GCI that FCLs could be adjusted after issuance, indicating that “commitments are not finalized until the FCC Form 467 is received from the HCP and the HSS

¹⁸ See, e.g., Additional Comments of GCI Communication Corp. at 4-6, WC Docket No. 17-310 (filed Jan. 30, 2019) (“Additional GCI Comments”).

[HCP Support Schedule] is produced.”¹⁹ GCI and its customers therefore understood that the FCLs—which, again, taken together approve in each case *more* funding than ultimately sought—could be adjusted to reflect the dates of the services actually provided.²⁰ As noted above, however, USAC abandoned that advice—USAC’s denials essentially hold that while service dates under the second FCL may be shortened to *reduce* support for the upgraded service, they may not be extended to increase support for the less expensive original service.

The discussions of that issue in the decisions provide almost no explanation of *why* that is so, however. Indeed, the only legal proposition in the letters that appears even remotely relevant appears much earlier, in their “Background” sections. There, the decisions state that “[s]upport provided under the FCL is capped at the amount provided in the letter, and the applicants are unable to receive additional support,” citing to the Commission’s 2012 decision in the Healthcare Connect Fund Order.²¹ But USAC’s citation is incomplete. The Healthcare Connect Fund Order expressly permitted service substitutions to address this exact situation. Nothing in that Order precludes USAC from implementing—as it expressly advised that it would—commonsense adjustments to FCLs to permit support for the entire pre-upgrade period. And prior to FY2016,

¹⁹ See Attachment C, Attachment 9 to Letter of Appeal from Timothy Simeone to USAC RHCD (Aug. 27, 2018), Email from Bernie Manns, RHCD, to Jennifer Bachman, GCI (Oct. 20, 2016).

²⁰ See also Attachment J, GCI July 2019 Request for Review at 5-6 (quoting email correspondence with USAC stating that, “[p]ractically speaking, as long as the HCP does not submit the Form 467. . . service start and end dates could be modified on an FCL (in most cases),” and explaining that “GCI and its customers understood the Form 467 process of fixing service dates after-the-fact would avoid funding gaps”).

²¹ See, e.g., Atka USAC Denial Letter at 2 & n.9.

USAC had allowed overlapping funding commitments, pending the finalization of service installations, to address this problem.²²

Nor do the RHC Telecom Program rules support USAC's decisions. The RHC Telecom Program rules in place at the time, contained in 47 C.F.R. §§ 54.603-54.625, simply did not address the issue of changes in service installation dates. The rules did, in contrast, contain detailed requirements for certification, posting, and waiting periods for the competitive bidding forms;²³ the requests for services submitted to service providers;²⁴ and document retention periods for HCPs.²⁵ The rules even specified an annual filing requirement to file new funding requests each year for HCPs seeking support, and that for long-term contracts, "the Administrator shall only commit funds to cover the portion of such a long term contract scheduled to be delivered during the funding year for which universal service support is sought."²⁶ But despite these many specific provisions regarding other aspects of RHC administration, the rules did not address delays in service upgrade installations, or the ability of

²² For one customer in FY2015, USAC issued an FCL for the pre-upgrade 3 Mbps service for 12 months, and another FCL for the post-upgrade 5 Mbps service for 5.2 months, which resulted in overlapping funding commitments. *See* Attachment K at 1-6. USAC issued a support schedule on February 25, 2016 approving 12 months of support for the 3 Mbps service, and then on May 13, 2016, after the service installation dates were confirmed, issued a revised support schedule approving only 7 months of support for the 3 Mbps service. *Id.* at 7-11.

²³ *See* 47 C.F.R. § 54.603(b) (2016) (prior to Nov. 12, 2019 amendment) ("Posting of FCC Form 465," providing that "[t]he health care provider shall wait at least 28 days from the date on which its FCC Form 465 is posted on the website before making commitments with the selected telecommunications carrier(s).").

²⁴ *See* 47 C.F.R. § 54.615(c) (2016) (prior to Nov. 12, 2019 amendment) (stating that the request for services must be signed by an authorized officer of the HCP, and shall include a list of certifications under oath).

²⁵ *See* 47 C.F.R. § 54.619(a) (2016) (prior to Nov. 12, 2019 amendment) (requiring HCPs to maintain documentation for five years).

²⁶ 47 C.F.R. § 54.623(a), (b) (2016) (prior to Nov. 12, 2019 amendment).

HCPs to substitute *actual* dates of service on their connection certification forms after funding commitments have been issued. As such, the rules plainly do not *require* USAC's inflexible policy regarding mid-year service changes and installation delays.

As noted above, the Commission has previously reversed USAC denials that prevented HCPs from achieving service upgrades. Specifically, in 2013, USAC began to deny funding requests for HCPs seeking bandwidth upgrades under existing evergreen contracts as violations of the competitive bidding rules.²⁷ Alaskan HCPs then filed appeals challenging USAC FY2013 funding denials, and the Wireline Competition Bureau granted those appeals in a streamlined resolution document, finding the upgrades were not cardinal changes.²⁸ Similarly, the Commission has previously directed the RHC division of USAC to revise its processes when they sacrificed the substantive goals of the RHC Program to achieve administrative goals.²⁹ It should do so again here.

The purpose of the RHC Program is to facilitate the affordable, reliable, and sustainable provision of telehealth services in our nation's rural and underserved communities.³⁰ Telehealth is of critical importance in Alaska, where many rural communities are inaccessible by road and where over one hundred villages have fewer than 100 residents.³¹ The Commission recently

²⁷ At the time, GCI wrote to USAC arguing that this position was not supported by Commission precedent in the RHC program. See Attachment J, GCI July 2019 Request for Review at Exhibit 2.

²⁸ *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, Public Notice, 29 FCC Rcd. 12721, 12726-27, n.11 (2014).

²⁹ See, e.g., Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, 64 Fed. Reg. 66778, ¶ 30 (Nov. 30, 1999) (concluding that administrative difficulties were not so great as to justify barring applicants from adding new entities to existing contracts by submitting a new Form 465).

³⁰ See Promoting Telehealth Order ¶¶ 1-4.

³¹ Additional GCI Comments at 5.

undertook a comprehensive rulemaking to improve the administration of the RHC Program, to implement USAC’s decisions as efficiently as possible, and to make “participation in the RHC Program as straight-forward and predictable as possible.”³² Requiring HCPs or service providers to return funding to USAC that was properly authorized by two easily identifiable funding commitments—for the same HCP, for the same site, for the same funding year—is not efficient, straightforward, or predictable. It creates additional burdens for program administrators and HCPs alike, with no sound basis in either the letter or spirit of the Commission’s rules.

In short, the Commission should consider the two applicable FCLs for an HCP for a funding year *together* when evaluating whether disbursed funding was authorized by USAC’s funding commitments. Nothing in the Commission’s rules or precedents prevents this, and no rule says that support for services being upgraded cannot be conformed to the actual service dates for each service across the two funding requests. GCI asks the Commission to direct USAC to increase support under the first FCL for the pre-upgrade service and reduce the support under the second FCL for the post-upgrade service in order to conform to the actual service delivery dates. This would result in an application of the Commission’s rules to prevent sacrificing the substantive goals of the RHC Program due to administrative hurdles.

II. THE COMMISSION SHOULD WAIVE ITS RULES RETROSPECTIVELY AND APPLY THE SERVICE SUBSTITUTION RULE TO FY2016.

If the Commission agrees with USAC that the rules as written do not permit relief here, GCI—in the alternative—seeks a waiver of the rules applicable in FY2016 to allow the application of the service substitution rule from the HCF program, contained in 47 C.F.R.

³² See Promoting Telehealth Order ¶ 208.

§ 54.646, to the FY2016 FRNs at issue here.³³ This year, the Commission adopted an order extending the rule to the Telecom Program. The Commission decided to “further align the RHC Programs by making the site and service substitution criteria under the Healthcare Connect Fund Program applicable to the Telecom Program.”³⁴ The rule provides that site and service substitutions are permitted if: (1) the substitution is provided for in the contract, within the change clause, or constitutes a minor modification; (2) the site is an eligible HCP and the service is an eligible service under the program; (3) the substitution does not violate any contract provision or state or local procurement laws, and; (4) the requested change is within the scope of the controlling request for services, including any applicable request for proposal used in the competitive bidding process.³⁵ Additionally, support is restricted to qualifying site and service substitutions that do not increase the total amount of support under the applicable funding commitment.³⁶

The service substitution rule, as USAC recognized when it referred to the HCF version in its denial notices, contains a provision guaranteeing funding only if a service substitution will not cause the total amount of support under the FCL to increase,³⁷ which USAC interpreted to mean

³³ The Commission adopted these conditions in its HCF rules in 2012 but declined to include them in the RHC Telecom rules. The 2012 Order explained that “GCI asks that the Commission apply the site and service substitution policy to the existing RHC programs at this time. . . We decline to extend this policy to the Telecommunications Program in this proceeding, which did not propose such policy changes for that program. We may consider adopting such changes for that program in the future, if they work well in the Healthcare Connect Fund.” See Healthcare Connect Fund Order at n.746.

³⁴ See Promoting Telehealth Order ¶ 194.

³⁵ See 47 C.F.R. § 54.624; see also Promoting Telehealth Order ¶ 194.

³⁶ Promoting Telehealth Order ¶ 194.

³⁷ 47 C.F.R. § 54.646(b) (2016) (prior to Nov. 12, 2019 amendment).

that support for an FRN is “capped” at the amount provided in the FCL.³⁸ USAC relied on one specific provision of this rule for the limit on support, but did not recognize that the rest of the rule actually provides a way for HCPs to accommodate mid-year service upgrades involving installation delays.

Here, the changes could have been accommodated under the service substitution rule by substituting the pre-upgrade, lower bandwidth service for part of the period in the second FCL authorizing funding for the upgraded, higher bandwidth service. The Commission has concluded that service changes are permitted under existing contracts where the change does not represent a “cardinal change,” i.e., where the change is within the scope of the original contract(s).³⁹ In a situation in which an upgrade is delayed, bandwidth changes to the pre-upgrade service level pending completion of the upgrade (here, changing the FCL from 10 Mbps Satellite to 3 Mbps Satellite or from 15 Mbps Satellite to 10 Mbps Terra and 5 Mbps Satellite for the period during which upgrade was delayed) would not constitute a cardinal change to the applicable contract(s), and thus do not generally constitute modifications requiring new competitive bidding.⁴⁰ For the

³⁸ See, e.g., Attachment E, Letter from the Universal Service Administrative Company to Timothy Simeone, at 2 & n.9 (Sept. 30, 2019).

³⁹ See GCI July 2019 Request for Review; see also *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd. 5318, ¶ 227-29 (1997) (and cases cited therein) (finding that minor contract modifications or modifications contemplated in the underlying contract are not cardinal changes and do not require additional competitive bidding); Healthcare Connect Fund Order at ¶ 261 (reiterating Commission’s conclusions in the Universal Service Fourth Order on Reconsideration concerning cardinal changes; also stating that contracts designated as evergreen contracts are exempt from the Commission’s competitive bidding requirements for the life of the contract).

⁴⁰ See *AT&T Commc’ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1206 (Fed. Cir. 1993) (concluding that an upgrade from a T1 to a T3 service fell within the scope of the contract at issue). Likewise, in instances where there are two contracts, the first covering the initial service and the second covering the upgraded service, extending the first contract pursuant to applicable contractual terms and delaying the start of the second contract to account for a service delay

four sets of FRNs for services to the NSHC HCPs (Elim, Golovin, Koyuk, and White Mountain), the same contract covered both the pre-upgrade and the upgraded services and the changes were clearly provided for in the contract.⁴¹ For the four sets of FRNs for services to the APIA HCPs (Atka, Nikolski, Oonalaska, and St. George), the pre-upgrade service was provided under the month-to-month service extension clause of one contract, until the upgraded services under a second contract were installed.⁴² Thus, in all cases, the temporary service substitution to the pre-upgrade service under the second FCL would be within the terms of the applicable, competitively bid contract(s), whether there is one or two underlying contracts.

For the eight sets of FRNs and FCLs at issue here, instead of attempting to adjust the dates on the *first FCL*, GCI could have, under a service substitution approach, substituted the original, pre-upgrade service for several months under the *second FCL* to reflect the actual delay in installing new services. This would result in receiving the total amount of funding authorized under the first FCL, and then receiving less funding than authorized under the second FCL. The total amount of funding disbursed, however, would remain the same under a date adjustment theory or a service substitution theory. Because the Commission has now adopted the service substitution rule for the Telecom Program specifically, service substitutions appear to be best way to resolve this situation going forward.

The Commission's rules may be waived "for good cause shown."⁴³ The Commission may grant a request for waiver where "particular facts would make strict compliance inconsistent

would not constitute a modification requiring new competitive bidding and, thus, generally is not a cardinal change.

⁴¹ See Attachment A at "Contract Information," columns C & D.

⁴² See *id.*

⁴³ 47 C.F.R. § 1.3.

with the public interest,” and waiving the rule “better serves the public interest.”⁴⁴ A similar waiver standard allows the Commission to waive its rules where “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest,” or “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”⁴⁵ The underlying purpose of the RHC Program is frustrated by USAC’s current application of the rules, and a grant of waiver would be in the public interest because it would encourage HCPs to upgrade to the services necessary to provide healthcare in rural Alaska without risking funding or service gaps caused by unforeseeable changes in installation dates.

As noted above, and as the Bureau is aware, rural telehealth is crucial to healthcare in Alaskan communities, and many HCPs would not otherwise be able to secure connectivity without RHC funding.⁴⁶ Granting relief is necessary in cases such as these because of the critical role of the RHC Program in supporting delivery of health care in rural and remote areas of Alaska. As the Commission recently recognized, the Telecom Program fills a critical need in Alaska, “given the vast number of communities without access to roads and the unique cost considerations they may face for obtaining service.”⁴⁷

⁴⁴ *Northeast Cellular*, 897 F.2d at 1166.

⁴⁵ 47 C.F.R. § 1.925 (b)(3)(i)-(ii).

⁴⁶ *See Rural Health Care Support Mechanism*, Order, 32 FCC Rcd. 5463, ¶ 5 (2017) (recognizing the “significant public health consequences” of unexpected funding reductions to HCPs in Alaska).

⁴⁷ Promoting Telehealth Order at ¶ 21; *see also id.* at ¶ 34 (“Alaska is in a unique situation where most of the land mass is inaccessible by road. Many communities are only accessible by plane or boat. The barriers to providing telecommunications services to these off-road communities are thus typically higher than on-road communities.”).

CONCLUSION

In sum, USAC's denials here have no basis in law or policy. The Commission's rules simply do not address this situation. GCI asks the Commission to direct USAC to increase the dates in the first FCL for the pre-upgrade service and decrease the dates in the second FCL for the post-upgrade service to reflect actual service delivery. This would result in an application of the Commission's rules to prevent sacrificing the substantive goals of the RHC Program due to administrative hurdles. In the alternative, the Commission should grant a waiver of the then-applicable Telecom Program rules and apply the service substitution rule to address service upgrades in FY2016. The service substitution rule provides a solution to this issue by allowing HCPs to substitute the pre-upgraded service for part of the period under the second FRN, without changing the dates or increasing the amount of funding provided under either FCL, with no harm to the fund. "[G]ood cause" exists to grant this waiver, and the Commission has recently concluded that these service substitution rules do apply to the Telecom Program going forward.

Respectfully submitted,



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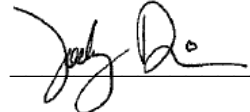
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November 15, 2019

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CERTIFICATE OF SERVICE

I certify that in accordance with 47 C.F.R. § 54.721(c) I served a copy of this Request for Review on the USAC Administrator consistent with the requirement for service of documents set forth in 47 C.F.R. § 1.47 on November 15, 2019.

A handwritten signature in black ink, appearing to read 'Joely Denking', is written over a horizontal line.

Joely Denking